(2014) 04 BOM CK 0218

In the Bombay High Court

Case No : Sales Tax Application No. 18 of 2011 in Reference Application No. 249 of 2008

Additional Commissioner of Sales Tax APPELLANT

Vs

Narang Enterprises RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:
Bombay Sales Tax Act, 1959 — Section 41

Citation : (2014) 72 VST 510

Hon'ble Judges : S.J. Vazifdar, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : J.S. Saluja, Additional Government Pleader, Advocate for the Appellant; Nikita R. Badheka, Advocate for the Respondent

Judgement

1. The appellant seeks an order directing the Maharashtra Sales Tax Tribunal, Mumbai (MSTT) to refer the following question of law to this court:

Whether, on the facts and circumstances of the case and the correct interpretation of the Schedule C, Part II, entry 14 vis-?-vis the Schedule C, Part II, entry 17 of the Bombay Sales Tax Act, 1959, the Tribunal was correct in holding the sales of mineral water by way of service in the restaurant as the sales of non-alcoholic drinks falling under Schedule C, Part II, entry 14, when there is a specific Schedule C, Part II, entry 17 for mineral water ?

The respondents are registered under the Bombay Sales Tax Act ("the BST Act") and the Central Sales Tax Act and run several restaurants having permit rooms which serve Indian-made foreign liquor (IMFL) as well as non-alcoholic drinks.

2. The respondent was assessed for the financial year 1997-98 under the BST Act. The respondent being aggrieved by the assessment order dated March 30, 2001, passed by the Assistant Commissioner of Sales Tax filed an appeal. The Deputy Commissioner by an order dated November 15, 2003, dismissed the appeal. The MSTT by an order dated August 21, 2008 allowed the respondent''s

appeal. The respondent had contended that the assessing authority had erred in levying the tax in respect of the sales of aerated drinks and mineral water sold to the customers at the restaurants at the rates stipulated in Schedule C, Part II, entries 17, 21. According to the respondent, the aerated drinks and mineral water served at their restaurants are governed by Schedule C, Part II, entry 14 and are liable to tax at 10 per cent, under an entry A-13(3) of a notification issued u/s 41. The MSTT upheld the respondent''s case and directed the assessing authority to pass necessary orders reworking the amount accordingly.

3. The present application is limited only to mineral water and is not in respect of aerated drinks. According to the appellant, mineral water served at the respondent''s restaurant falls under Schedule C, Part II, entry 17. The MSTT upheld the respondent''s contention that mineral water sold by them at their restaurants fall under Schedule C, Part II, entry 14. Schedule C, Part II, entry 14 and Schedule C, Part II, entry 17 read as under:

The rates were changed by notifications.

4. Mineral water does fall under Schedule C, Part II, entry 17. However, in our opinion, it also falls under Schedule C, Part II, entry 14 for mineral water is undoubtedly a non-alcoholic drink. Qua mineral water Schedule C Part II, entry 14 is a specific entry in that this entry deals with mineral water not generally but mineral water served for consumption, inter alia, at or in the immediate vicinity of any public restaurant or in any club or supplied by a public restaurant or club. Schedule C, Part H, entry 14 deals with non-alcoholic drinks not generally but in relation to the place at which they are served.

5. Mr. Saluja, the learned Assistant Government Pleader appearing for the appellant invoked the common parlance test. Mr. Saluja contended that a customer at a restaurant who wants mineral water does not ask to be served "non-alcoholic drinks''". He asks for "mineral water". He submitted that therefore, mineral water in common parlance does not fall within the ambit of the words "non-alcoholic drinks".

6. Firstly, this contention was not even raised before the MSTT. As noted in the order of the MSTT, no reason whatsoever was given for denial of the benefit as far as mineral water was concerned. The notification entry A-13(3) was applicable, inter alia, in respect of non-alcoholic drinks served in restaurants. The only reason given before the MSTT for denying the respondent the benefit in respect of the aerated drinks was that the same were manufactured by the respondent with the help of the machinery installed in the restaurant, they were not served to the customers and that the customers served themselves the same. Had the issue been raised before the authorities under the BST Act, the respondent may well have furnished an answer to the same. It would be unfair to the respondent to permit such a contention to be raised in a reference u/s 61, although it was not raised before the MSTT.

7. Secondly, there is no material on record to establish that in common parlance

mineral water would not be included within the ambit of the words "non-alcoholic drinks". It is not the appellant''s case that mineral water served by the respondent was an alcoholic drink. The appellant admits that it was non-alcoholic drink. That the plain meaning of the words "non-alcoholic drinks" includes mineral water is not and indeed cannot be denied. Thus absent any material, it is not possible to uphold the contention on the basis of the common parlance test.

8. The matter, therefore, does not raise a substantial question of law. The application is therefore, dismissed.